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No. 89-1167

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

ROBERT L. BRUTSCHE, M.D., Petitioner,

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent, Linda Cleveland-Perdue, misstates the record and the district court's findings in the Statement of Facts in her Brief in Opposition. In addition, Perdue relies upon a Seventh Circuit case vacated by this Court. Respondent's Brief in Opposition, p. 16 (citing *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813).

I.

RESPONDENT'S STATEMENT OF FACTS CONTAINS MISSTATMENTS OF FACTS NOT SUPPORTED BY THE RECORD OR BY THE DISTRICT COURT'S FINDINGS

Although reply briefs are limited by Rule 15.6, Rules of the Supreme Court of the United States, to arguments first raised

in the brief in opposition, Perdue's Statement of Facts contains statements unsupported by the district court's opinion or the record. Perdue did not point out any misstatement of fact in Dr. Brutsche's petition as requested by Rule 15.1, but rather restated the facts with baseless statements that merit correction.[1] A number of examples where Perdue has mischaracterized the record or the district court's opinion follow.

Perdue suggests that Dr. Brutsche approved of the lack of a full-time physician after Silverman's resignation. She argues, " For seven months after Dr. Silverman's resignation, the prison was left without a full-time doctor; Dr. Brutsche knew and approved of this. (App. B-12)" Respondent's Brief in Opposition, p.6. The undisputed facts as found by the district court contradict Perdue's contention that Dr. Brutsche approved of the situation. The facts indicate it was difficult to find doctors

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1 In addition to groundless statements in the Statement of Facts, Perdue's Statement of the Case has irrelevant statements. First, Perdue's statement regarding a proposed settlement of the lawsuit is irrelevant:

> Defendants Carlson, Brutsche and DeGracias then entered into a settlement with Plaintiff, agreeing to pay decedent's estate $150,000 on the condition precedent that their principals — the Justice Department — implement a regulation providing for indemnification of federal employees acting within the course of their employment.

Respondent's Brief in Opposition, p. 2. This Court should disregard the statement as irrelevant to the legal issue of whether Dr. Brutsche is entitled to qualified immunity. *See* Rule 408, Federal Rules of Evidence. Second, Perdue points out that following remand from this Court, "the United States Attorney for the Southern District of Indiana was replaced by three separate privately retained and publicly renumerated [sic] law firms." Respondent's Brief in Opposition, pp. 1-2. This statement is immaterial to the appeal.

who would accept a full-time position at the prison:

> At the time of the first significant incident in this case, the death of William Lowe, there was one full time physician, Dr. Silverman, employed at the Terre Haute prison instead of the usual two. This was because the expiration of the draft, low salaries, and the unappealing nature of the work make it difficult to hire a physician. Instead, the second physician "slot" was filled by five rotating physicians.

Appendix to Petition for Writ of Certiorari ("App.") B-2. The district court found that after Dr. Silverman's resignation, the five rotating physicians stepped up their responsibilities. App. B-4. During the interim period:

> Brutsche began looking for a full time physician to replace Silverman by advertising, contacting the Civil Service, and seeking assignment from the Public Health Service.

App. B-6. Dr. Brutsche did not approve of the absence of a full-time physician; it simply was that no physician was available to be hired full-time.

Perdue misstates the record and the district court's findings by implying that Dr. Brutsche had a duty to write a written report. She further misstates the facts by claiming that Dr. Brutsche intentionally prepared no written report on his investigation in January, 1975:

> [Dr. Brutsche] intentionally prepared no written report of the systemic breakdown suggested by Lowe's death[.] (App. B-5) Although Brutsche recognized the structural problems in the delivery of emergency medical care raised by the death of William Lowe, Brutsche instituted no substantive changes in hospital procedures, staffing, or training after Lowe's death. (App. B-5)

Respondent's Brief in Opposition, p. 5. Perdue cites to page 5 of the district court's opinion.

The district court's opinion contradicts the statements that Dr. Brutsche "intentionally prepared no written reports" or that "Brutsche recognized the structural problems in the delivery

of emergency medical care. . . [and] instituted no substantive changes. . .". The district court's opinion, on the page cited by Perdue, states:

> About two weeks after Lowe's death, and as a result of his investigation, Brutsche issued a "Memorandum" to all Regional Administrators for Medical Services in the Bureau of Prisons. He recommended the maintenance of a nursing "kardex" to strengthen record keeping. A week later he issued a second "Memorandum" which essentially explained their function and gave instructions as to who should keep them and how they should be kept. This is apparently the extent of the changes Brutsche recommended in writing, as a result of Lowe's death. No written report was submitted by Brutsche to Carlson, although Brutsche verbally informed Carlson of his findings and it is not clear whether a written report was the normal procedure.

App. B-5. Neither the district court's opinion nor the record support Perdue's claim that Dr. Brutsche failed to institute changes or intentionally prepared no written report.

Perdue also misstates the record by making general statements that omit to inform this Court of facts detrimental to her case. She states, "The medical facility at Terre Haute was not adequately staffed or equipped," Respondent's Brief in Opposition, p. 5, thereafter arguing that the medical care was provided by inmate nurses. Perdue fails to inform this Court that the prison had five doctors available to provide medical services in addition to other specialists, such as an orthopedist, an optometrist, an oral surgeon, an anesthesiologist, an audiometrist, a neurologist, a urologist, a radiologist, an ophthalmologist, a dermatologist, an x-ray technician, a laboratory technician, a pharmacist, and a surgeon, who were available as needed. App. B-4; Affidavit of Mark O. Thompson, October 2, 1984, Exhibit B.

Perdue also suggests that it was Dr. Brutsche's duty to establish criteria and procedures for evaluating a staff physician's performance. Respondent's Brief in Opposition, p. 6. That duty belonged to the Regional Administrators for Medical Services (RAMS) and the warden of the particular prison. The

warden at the Terre Haute facility, Charles L. Benson, stated:

> Brutsche, himself, did not have any direct responsibilities, in 1975, for the daily direct administration of medical care to inmates at the USP-Terre Haute, nor did Brutsche have any hands-on role regarding the care specifically provided to an inmate on the doctor-to-patient level, such direct physician-to-patient services then being the responsibility of the chief of health services or other physicians and/or physicians' assistants at the USP-Terre Haute.

Affidavit of Charles L. Benson, September 23, 1984, p. 3.

The district court also noted that Dr. Brutsche did not have responsibility for the daily administration of medical care. App. B-2. Under Dr. Brutsche, the district court found there was a Deputy Medical Director and five RAMS along with a Chief Physician and Hospital Administrator at each prison. App. B-2. The Chief Physician was responsible for the professional medical care of the inmates and the Hospital Administrator was responsible for the management of the hospital administrative functions. App. B-2. Both the Chief Physician and the Hospital Administrator worked directly under the authority of the Warden. App. B-2.

Perdue claims that Dr. Brutsche did not establish written procedures for referring prisoners to outside facilities. Respondent's Brief in Opposition, p. 7. Initially, it should be noted that it was not Dr. Brutsche's duty to do so. In any event, a copy of the minutes of the medical staff meeting held on February 26, 1975, a month after William Lowe's death and seven months before Jones' death, which was sent to the prison doctors and the physicians' assistants (PA's), showed that written procedures were in effect to refer prisoners to outside facilities:

> The Warden also stated that if the PA feels a patient should be sent to the hospital after duty hours or on weekends, the PA should call an ambulance and send the patient to town. He hopes the PA would not overreact, but he would rather have the patient sent to the hospital and returned if we have to. Dr. Freed agreed and added that the PA should call the doctor and notify the hospital.

Affidavit of Charles L. Benson, September 23, 1984, Exhibit 1. There was also an update of a full-page memorandum setting forth emergency procedures entitled "Special Procedures To Be Followed in Case of Serious Medical Emergency After Hours" that went into effective on August 11, 1975, before Jones' death on August 14, 1975. Affidavit of Mark O. Thompson, October 2, 1984, Exhibit H; Affidavit of John W. Smith, September 26, 1984, Exhibit B; Affidavit of Edward Griffin, September 28, 1984, Exhibit A; Affidavit of Johnny Copher, September 27, 1984, Exhibit L.

Because of these misstatements and others, Perdue's Statement of Facts lacks the objectivity necessary to assist this Court in the resolution of the legal issue. Dr. Brutsche refers this Court to the district court's opinion to discover the facts material to the consideration of Dr. Brutsche's entitlement to qualified immunity.

II.

THE CHALLENGE TO THE SEVENTH CIRCUIT'S ADOPTION OF THE "CLEAR TREND" TEST FOR QUALIFIED IMMUNITY DID NOT QUESTION THE SEVENTH CIRCUIT'S USE OF VALID CASES OUTSIDE OF ITS JURISDICTION TO DECIDE WHETHER THE CONSTITUTIONAL RIGHT WAS "CLEARLY ESTABLISHED"

Perdue argues that the Seventh Circuit's decision to review other cases, when no Supreme Court or Seventh Circuit decision controlled, was consistent with the "clearly established" test of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Respondent's Brief of Opposition, pp. 10-11. Dr. Brutsche does not challenge the Seventh Circuit's decision to look to other law when there is no controlling law in the jurisdiction, rather Dr. Brutsche challenges the Seventh Circuit's reformulation of the "clearly established" test into the "clear trend" test. If the constitutional right at issue was "clearly established" consistently without any decisions to the contrary within other jurisdictions, then Dr. Brutsche would not be before this Court.

Perdue's argument begs the question of whether the Seventh

Circuit's "clear trend" approach to qualified immunity is consistent in principle with this Court's "clearly established" test of *Harlow*. The beginning of a trend towards the establishment of the right is simply not a clearly established right. The district court, after having reviewed the facts three times, concluded that the law was not clear:

> Another one of the many difficulties this Court has had with this case is that there is virtually no law granting qualified immunity to a defendant in a medical care/prison context. In other words, many cases have found defendants liable, thereby setting a liability floor, but none have set a ceiling by which this Court can judge the limits of the liability.

App. B-18. If a district judge, learned in the law, could not determine the limits of liability, then Dr. Brutsche, a medical doctor not trained in the law, would surely have difficulty determining whether his acts were unconstitutional.

The district court, as well as Perdue, relied upon *Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974), *vacated sub nom., Cannon v. Thomas*, 419 U.S. 813. App. B-20; Respondent's Brief in Opposition, p. 16. The Seventh Circuit ruled the reliance on *Thomas v. Pate* was misplaced because it dealt with individual instances of deliberate indifference rather than systemic claims. App. A-7. Reliance on *Thomas v. Pate* is also misplaced because the case was vacated by this Court. Such an action indicates how unstable the law was in this area.

Perdue argues that the Seventh Circuit's decision does not require a government official to predict future developments in the law, but rather to follow the federal constitutional law at the time. Respondent's Brief in Opposition, p. 12. The fact remains, however, that a clear trend toward the establishment of a right is so unsettled as to thwart a public official's legitimate attempts to follow the constitutional law at the time. The caselaw in 1975 was not sufficiently settled to allow Dr. Brutsche to mold his conduct to conform with it. Thus, a clear trend developing constitutional rights cannot equal a clearly established right.

Perdue argues that this Court should deny a writ because

the case has no significance beyond these particular facts. Respondent's Brief in Opposition, pp. 9, 14. Every question of qualified immunity to some extent is fact-sensitive, but it does not follow that review by this Court would be of little value to other public officials. Changes in the qualified immunity test that throw public officials into a legal maze that judges trained in the law cannot solve affects all public officials. The qualified immunity test should be a definitive test that public officials ignorant of legal nuances should be able to clearly discern without jeopardy.

Finally, Perdue maintains that granting certiorari will delay trial. Respondent's Brief in Opposition, p. 17. The delay is a result of Perdue's attempt to sue improper parties.

III.

CONCLUSION

Petitioner, Robert L. Brutsche, M.D., respectfully requests that this Court grant his petition and issue a writ of certiorari.

Respectfully submitted,

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